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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0894-18

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/9/2019
DEANA WILLIAMSON, CLERK

VITH LOCH, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Harris County
No. 01-16-00438-CR

* * * * *

STATE PROSECUTING ATTORNEY'S REPLY BRIEF

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

ARGUMENT

The State Prosecuting Attorney offers the following arguments and clarifications in response to Appellant's Brief on the Merits.

1. Suggested Harmless Error Standard

The State does not ask this Court to carve out an exception to Article 26.13(a)(4). *See* Appellant's Brief on the Merits, at 10. The State only seeks to apply a specific harmless error rule when a defendant who was already removable or inadmissible at the time of a guilty plea complains about a trial court's failure to admonish under Article 26.13(a)(4). For purposes of assessing harm, a defendant's lack of awareness about his status could not have affected his decision because it cannot rationally be said it would impact his decision. *See* State's Brief on the Merits, at 16-17. A matter that maintains the status quo is immaterial to a plea. Thus, being already removable and inadmissible when pleading guilty means that there was no change in the person's immigration status. When there was no change, then there can be no actual harm. *See Guerrero v. State*, 400 S.W.3d 576, 588-89 (Tex. Crim. App. 2013) ("the prospect of removal . . . could not reasonably have affected" Guerrero's decision to plead guilty because, as an undocumented immigrant, he was "deportable for that reason alone[.]").

2. Repatriation as a Cambodian

That Appellant could not have been accepted for repatriation by Cambodia before 2002, *see* Appellant's Brief on the Merits, at 12, is of no consequence. First, Appellant entered his guilty plea in 2016. 1 CR 144; 5 RR 9-11. This was fourteen

years after the United States and Cambodia entered into a repatriation agreement in March 2002. So, as a matter of law, Appellant was removable and inadmissible when he entered his plea. *See* State's Brief on the Merits, at 6-17.

Further, the non-existence of the repatriation agreement before 2002 does not support the claim that Appellant would have lacked awareness about his status in 1990 and 1996. *See* Appellant's Brief on the Merits, at 13-14. The important fact, according to TEX. CODE CRIM. PROC. art. 26.13(a)(4), is whether, at the time of the plea, the person is aware that he "may" be subject to "deportation, the exclusion from admission to this country, or the denial of naturalization under federal law[.]" The text of Article 26.13(a)(4) contemplates a possibility; it is not absolute. Nor does it speak to the mechanics of physical displacement. So even when repatriation was not possible, the United States still could have obtained an order for removal or deportation or a bar of admission. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 684-686 (2001) (orders of deportation and removal against foreign nationals who could not repatriate). Only the post-removal-period-procedures would have differed. The United States would have been able to temporarily confine Appellant even if it could not effectuate an order by physically removing Appellant from its jurisdiction. *Id*. at 701 (permitting confinement until it is "determined that there is no significant likelihood of removal in the reasonably foreseeable future.").

3. Knowledge of the ICE Detainer

Evidence of an ICE detainer was in fact included as part of Appellant's stipulations. *See* Appellant's Brief on the Merits, at 15. When pleading guilty, Appellant stipulated to the documents contained in State's Exhibit 27.

> MR. ALLARD: The State would offer into evidence State's Exhibit No. 26, 27, and 28. These are the J and S's that go along with the stipulations that are already in evidence.
>
> MR. PAYNE: No objections to 28, Your Honor. No objections, Your Honor, to 27, Your Honor. Your Honor, I withdraw -- no objections to 26, Your Honor.

5 RR 165-66. Next, Exhibit 27 included the following reference to an ICE detainer:

		--- LATEST INCARCERATION ---		
FILED	TYPE	AUTHORITY	CHARGE(S)	REMOVED
03/09/05	DETAIN	TDCJ PAROLE DIVISION	ADMIN RELEASE VIOL PAROLE	09/21/06
03/09/05	DETAIN	AUSTIN, TX	WRT 02-27-1996-03968631	09/21/06
03/09/05	DETAIN	PH 512-406-4614	FAX 512-406-5351/5313	09/21/06
12/20/05	DETAIN	ICE-MIAMI	A#025-391-301	

7 RR State's Exhibit 27 at 7.

4. Entry as a Refugee

Even assuming Appellant entered the United States as a refugee and was granted asylum, *see* Appellant's Brief on the Merits, at 20, his asylum could have been terminated by the Attorney General. 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i), 1158(c)(2)(B) (termination authorized for an alien who was convicted of a serious crime, including an "aggravated felony").[1] In such a case, he would have been removable under 8 U.S.C. §§ 1182(a), governing deportable aliens, and 1227(a), governing inadmissible aliens. 8 U.S.C. § 1158(c)(3).

[1] These provisions have been in effect since September 30, 1996. Omnibus Appropriations Act, Pub. L. No. 104-208, 11 Stat. 3009.

PRAYER FOR RELIEF

The State prays that the court of appeals' decision be reversed and the case remanded for consideration of Appellant's remaining claims.

Respectfully submitted,

/s/ Stacey M. Soule
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 707 exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State Prosecuting Attorney's Reply Brief has been served on April 9, 2019, via email or certified electronic service provider to:

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